

DECISION
TALBOT COUNTY BOARD OF APPEALS
Appeal No. 20-1713

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals (the Board) at the Wye Oak Room, Community Center, 10028 Ocean Gateway, Easton, Maryland 2160, beginning at 6:30 p.m. on October 19, 2020 on the Application of **John and Marianne MacDonald** (the Applicant). The Applicant is seeking approval of a critical area variance to exceed the fifteen percent (15%) lot coverage threshold by 1,691 square feet resulting in 9,000 square feet lot coverage or eighteen point five percent (18.5%) total lot coverage. Applicants will consolidate the two (2) lots if the variance is granted. The request is made in accordance with Chapter 190, Zoning, Article III, §190-15.6 C and Article VII, §190-58 of the Talbot County Code (the *Code*). The property is located on Riverview Terrace, St. Michaels, Maryland 21663 and is located in the Town Residential (TR) Zone. The property owners are John and Marianne MacDonald and the property is shown on Tax Map 201 parcel 1149, lots 9 and 10. The lots are a part of the Bentley-Hay Subdivision.

Present at the hearing for the Board of Appeals were: Phillip Jones, Chairman, Frank Cavanaugh, Vice Chairman; members Louis Dorsey, Jr., Paul Shortall, and Zakary A. Krebeck. Anne C. Ogletree served as attorney for the Board of Appeals. Miguel Salinas, Assistant Planning Officer and Elisa Deflaux, Planner II, were in attendance.

The Chairman inquired if all members had visited the site and received affirmative responses.

The following Board exhibits were then offered and admitted into evidence as indicated:

- Exhibit 1. Application for a Critical Area Variance with Attachment A;
- Exhibit 2. Copy of tax map with subject property highlighted;
- Exhibit 3. Notice of Public Hearing for Star Democrat;
- Exhibit 4. Newspaper confirmation;
- Exhibit 5. Notice of Public Hearing & Adjacent Property Owners List;
- Exhibit 6. Sign Maintenance Agreement;

Exhibit 7. Standards for Critical Area Variance with Attachment B;

Exhibit 8. Staff Report prepared by Elisa Deflaux, Planner II;

Exhibit 9. Sign Maintenance Agreement/Sign Affidavit;

Exhibit 10. Critical Areas Commission Letter;

Exhibit 11. Letter of Authorization;

Exhibit 12. Independent Procedures Disclosure and Acknowledgment Form;

Exhibit 13. Aerial Photograph;

Exhibit 14. Critical Area Lot Coverage Computation Worksheet;

Exhibit 15. Email from Lars Erickson dated 8/26/20;

Exhibit 16. Site Plan with Existing Conditions;

Exhibit 17. Site Plan with Potential Residence and Accessory Structures;

Exhibit 18. Multipage Submittal by Betty Blount submitted 10/13/2020;

Exhibit 19. Email from Bob Little dated 10/14/20;

Exhibit 20. Email from Michael Weeden dated 10/16/20;

Exhibit 21. (Applicant's Exhibit A) Aerial Photo;

Exhibit 22. (Applicant's Exhibit B) Brady Property, 723 Riverview Terrace;

Exhibit 23. (Applicant's Exhibit C) Kimbis Property, 716 Riverview Terrace;

Exhibit 24. (Applicant's Exhibit D) Site Plan, Lot 11, 725 Riverview Terrace;

Exhibit 25. (Applicant's Exhibit E) Marrah Property, 715 Riverview Terrace;

Exhibit 26. (Applicant's Exhibit F) Staff Correspondence on lot coverage;

Exhibit 27. Deed dated 8/15/78 imposing covenant on lots 9 and 10,
Liber 525 folio 691.

Mr. Jones asked that those who might wish to testify be sworn. Mr. Ryan Showalter and five witnesses were then sworn in. He next invited the Applicant to explain the reason for the Application.

Mr. Ryan Showalter, 100 N. West Street, Easton Maryland, 21601 introduced himself stating he was representing the Applicant, the MacDonalds, who were present at the hearing. He explained that the purpose of the appeal was to obtain a variance from the strict application of the lot coverage limitation contained in the Critical Area Overlay District *Code* regulations. He believed that the Applicant's property was unique. If one combines the Applicant's two lots, the

total lot coverage allowed is less than the total that can be achieved by developing each lot separately. He also noted that many of the properties in the surrounding area exceed the fifteen percent (15%) lot coverage limitation. Due to the current zoning laws the combined square footage would bring the lot area to over one acre. That total area cannot qualify for the 'enhanced' lot coverage permissible for smaller lots provided in *Code* §19-15. C 4 (a) If each of the two lots were considered separately, the total allowable lot coverage for each lot -- with the permission of the Planning Director and with compliance with the provisions of *Code* §190-15.6 C 4 (b) -- would be 5,445 square feet (sq. ft.); the total lot coverage for both lots, if combined, would be 7,309 sq. ft. That loss of lot coverage allowance creates a unique special hardship for the Applicants, as they would be unable to build the across lot lines without consolidating the two lots, and by consolidating they would be deprived of 3,581 sq. ft. of potential lot coverage. Without the grant of a variance and the proposed lot consolidation, construction would be pushed either to the east or west, will have a visual impact, and will affect pier placement and lateral lines.

Mr. Showalter's first witness was Lars Erickson, East Bay Construction Services, 24902 Back Creek Road, St. Michaels, Maryland 21663. Mr. Erickson explained that after he had been contacted by the Applicants regarding the construction of a new residence on their Riverview Terrace property, he checked with Planning and Zoning to see what options were available. He corresponded with Staff regarding the 'enhanced' lot coverage that might be permitted should one of the lots be developed. Exhibit 26. He recognized that lot coverage was an important issue in the Critical Area, and that it would certainly affect the design and location of the improvements as well. He also noted that if the parcels were developed separately the total lot coverage for both parcels, assuming the approval of 'enhanced' lot coverage, might be 10,890 sq. ft.¹. By combining the parcels to create a larger tract and to be able to build across lot lines the Applicants would only be permitted fifteen percent (15%) lot coverage of the combined lots 9 and 10, or 7,309 sq. ft.

Mr. Erickson explained that the Applicant was aware that its request would have to be the minimum necessary to provide relief. He proposed that the Board permit a variance allowing the Applicants the 'enhanced' lot coverage of 5,445 sq. ft. for the first lot (lot 10), then require that the Applicant could not exceed the fifteen percent (15%) lot coverage limitation for the

¹ The additional lot coverage is discretionary provided that the Planning Director believes that the statutory requirements of *Code* § 190-15.6 C have been met.

second lot, (Lot 9). This would result in 8,662 sq. ft. of lot coverage. However, the Applicant is rounding the request to 9,000 sq. ft. of proposed lot coverage to allow for small additions such as HVAC equipment platforms and steps. The lot coverage variance, if granted, would result in the Applicants consolidating the lots and a total eighteen point five percent (18.5%) lot coverage. If the variance is permitted, there would be only one principal residence. Any other structures shown on Exhibit 17, the proposed site plan, were the result of permitted accessory structures.

To illustrate conformance with other properties in the immediate area, Mr. Erickson produced Exhibit 21, labeled A, an aerial photograph of the Riverview Terrace area. He drew the Board's attention to the fact that there were several single and double lots in proximity to the Applicant's property that exceeded the permitted lot coverage thresholds.

For example, Exhibit 22, labeled B, is an aerial photograph of 726-728 Riverview Terrace (Map 201 parcel 1164 and 1165). Parcel shown as 728 Riverview is described in the tax records as 9,600 sq. ft. The residence alone is described as being 1,969 sq. ft. There would appear to be walkways and possibly a deck in addition to the main residence. The lot coverage is approximately twenty point eight percent (20.8%). The Parcel shown as 726 Riverview is somewhat larger, and is improved by a residence and pool².

Exhibit 23, labeled C, is a site plan for 716 Riverview Terrace, (Map 201, Parcel 1160). The total lot size is 22,665 sq. ft. Existing Lot coverage is 4,925 sq. ft. resulting in a twenty-one point seven percent (21.7%) lot coverage.

Exhibit 24, labeled D, is a site plan for 725 Riverview Terrace (Map 201, Parcel 1148). The lot is approximately ½ acre in size, some 24,599 sq. ft. The lot coverage shown is 5,092 sq. ft. resulting in twenty-one point eight percent (21.8%) lot coverage.

Exhibit 25, labeled E, is an enlargement of a part of Exhibit 21. Mr. Erickson pointed out that 715 Riverview Terrace, Lot 7 (Map 201 Parcel 1150) has 26,594 sq. ft. of land area. The residence alone is 4,232 sq. ft. There are other improvements that also constitute lot coverage. The witness believed that the total lot coverage would be approximately nineteen point five percent (19.5%).

² The SDAT sheet for 728 Riverview was not submitted as an exhibit, so that the lot coverage for parcel 1164 cannot be calculated from the data provided.

Mr. Erickson reported that the owners of Lot 8 (Map 201 Parcel 1150A) are planning to build on their unimproved lot. They will ask for the 'enhanced' lot coverage, as their property is less than one acre in size. It is estimated that the lot coverage for that parcel will be approximately twenty-two point nine percent (22.9%). The owner, Mr. Weeden has sent the Board an email. As an adjoining landowner, he was in favor of the Application. Exhibit 20. Mr. Erickson added that the lot coverage on the lots owned by Ms. Blount, an opponent, as well as that of Mr. Little, also an opponent, were well in excess of the fifteen percent (15%) lot coverage threshold, being approximately twenty four point six percent (24.6%). He opined that there were a number of properties with more than eighteen point five percent (18.5%) lot coverage in the immediate area. He acknowledged that most of the subdivision lots were about one-half acre in size³. He was unaware of any other subdivision lot greater than one acre in size.

Mr. Cavanaugh asked why there were other lots in the area that exceeded the fifteen percent (15%) lot coverage threshold. Mr. Erickson responded that the older lot configurations were grandfathered or had been granted the 'enhanced' lot coverage by the Planning Director. He was unaware that any request for the 'enhanced' lot coverage had been denied.

Mr. Showalter suggested that the witness explain Exhibit 26, labeled F. Mr. Erickson stated that he had not wanted to mislead his clients, so that he had inquired about the 'enhanced' lot coverage and received the correspondence attached as Exhibit 26 in response to his inquiry.

Mr. Cavanaugh stated that it was his understanding that the 'enhanced' lot coverage applied only to single lots. Mr. Erickson agreed, but added that the Applicant was only seeking the enhanced lot coverage for one of the two lots. The other lot would be required to meet the fifteen percent (15%) lot coverage limitation.

Mr. Jones indicated that he was having trouble with the various descriptions of the property. A variance is for a particular parcel. Mr. Showalter stated this is for lot 9 and lot 10. The application must be for a land area to be combined into a single parcel. Mr. Jones asked if it was for one lot, or two separate lots that were subsequently going to be combined into one? He was struggling with the concept. He noted that the Applicant seemed to want the best of both worlds.

³ In point of fact, an examination of Exhibit 2 shows the larger lots in the subdivision along the water, while the interior lots are smaller. Judging from the size of 728 Riverview, the single interior lots are approximately a quarter acre or roughly 10,000 sq. ft.

Board's counsel observed that a prior recorded covenant acted to require the consolidation of the lots for development purposes. Mr. Showalter explained he believed that the current zoning prohibited what was formerly accepted – building across lot lines in those cases where the owner was in title to adjoining lots. He opined that as far as the county zoning is now concerned, there are two separate lots. The Applicant's request would involve seeking the 'enhanced' lot coverage for only one of those lots. If that enhanced coverage is granted, the Applicant would not exceed the fifteen percent (15%) lot coverage limitation for the second lot.

Mr. Jones asked if the recordation of the covenants in 1978 would have consolidated the lot. Mr. Showalter replied that it didn't matter, as the county now requires an addition plat to do away with the interior lot lines and setbacks. He noted that there are other considerations as well. If the Critical Area legislation goals are to be met, the requested variance would push the improvements east and west as well as further back from the water and affect the lateral lines. The shoreline development buffer (SDB) area will be less affected. There will be an additional 5,000 sq. ft. of additional mitigation required. The new configuration would actually improve water quality as the lot would be more than sufficient in size to support greater mitigation.

Mr. Krebeck commented that if the intent of the covenant was to be considered, the property would be considered as one lot.

The next witness was Marianne MacDonald, 934 Riverview Terrace, St. Michaels, MD 21663. She and her husband purchased the property subject of the Application about five (5) years ago. Their family has expanded and their current residence does not have enough available lot coverage area remaining to enable them to have a pool or other usual accessory structures. If granted the variance they would build a new residence, a cape cod style two story home with a bunkroom over the attached two and one half (2 ½) car garage. The plans also call for a large pool house that could accommodate two bedrooms for guests. A pool is also contemplated.

Mr. Dorsey asked for the square footage of the Applicant's current residence. Mr. Showalter responded that according to the State Department of Assessment and Taxation (SDAT) records the square footage was 3,139. Mr. Dorsey then inquired about the square footage of the proposed residence. Mr. Erickson stated that the house would be about ten (10) sq. ft. larger than the Applicant's existing home.

Mr. Cavanaugh asked what the garage area was. Mr. Erickson commented that the garage was about slightly less than the standard three car garage.

Mr. Showalter summarized the Applicant's position reminding the Board that the lots in question were platted at the time that the Bentley-Hay subdivision was created in 1947. There was no zoning or Critical Areas law at the time. Since that time special circumstances have arisen with the enactment of the current zoning scheme that are both unique and unfair as well as prevent reasonable use of both lots as a single parcel without the grant of the variance. Recordation of the consolidation plat will produce less lot coverage than that permitted were the properties to be developed separately. This circumstance deprives the Applicant of the rights available to other property owners in the zoning district. Staff has approved the request. Exhibit 8, Staff Report.

Mr. Cavanaugh asked if there were other properties that had received special permission to consolidate.

Mr. Jones asked if the Applicant could have asked for zero (0) setbacks on the interior lot line and still construct the proposed improvement provided that the construction is kept within the single lot lines. Mr. Salinas and Mr. Showalter were agreed that unless the lots were consolidated the owners would not be permitted to go over the lot lines. Mr. Showalter added that the situation was very unique.

Mr. Krebeck thought that the guest house could be reduced in size.

Mr. Showalter commented that the issue is hardship. The Applicants are not asking to exceed what is permitted if the lots are viewed separately before consolidation. They seek to avoid a hyper-technical reading of the ordinance. He noted that Staff has approved the request contingent on consolidation. If the owners are not granted the variance they are not being afforded the same rights as others in the zoning district.

Mr. Jones observed that the request is to treat an undeveloped parcel over one acre in size as if it qualifies for greater than fifteen percent (15%) lot coverage. He was unaware of any like request being granted. The Board has to follow the law and must weigh facts and determine if there are special circumstances applicable to this property. That is its job. He did not consider following the law to be "hyper-technical".

Ms. Jennifer Esposito, Natural Resources Planner, employed by the Critical Areas Commission, (the CAC), 1804 West Street, Ste. 100, Annapolis, Maryland 21401 was present by telephone, as was Ms. Emily Vainieri, Assistant Attorney General, 580 Taylor Avenue C-4, Annapolis, Maryland, 21401.

Ms. Vainieri called Ms. Esposito as her witness. Ms. Esposito stated that she was CAC's Natural Resources Planner assigned to Talbot County. As such she reviews development projects in the Critical Area, including site plans and requests for variances. She has been in her position for approximately six (6) years. She sent a letter to the Board, Exhibit 10, expressing CAC's opposition the Applicant's requested variance since the project could be accommodated by downsizing the improvements to fit within the required lot coverage limitation. Ms. Esposito explained that lot coverage was the portion of a lot covered with man-made material, and that when consolidated the lots would contain 48,727 sq. ft. Fifteen percent (15%) of the lot area would be 7,309 sq. ft. If the lots were considered separately the lot coverage, fifteen percent (15%) of lot 9 was 3,555 sq. ft., while fifteen percent (15%) lot coverage for Lot 10 would be 3,754 sq. ft. for a total of 7,304 sq. ft. Ms. Esposito stressed that despite the indications in the Staff communication to Mr. Erickson, Exhibit 26, the grant of 'enhanced' lot coverage was discretionary, and not something the Applicant could rely upon. If one compared the total 'allowed' lot coverage for the two lots, the total lot coverage was actually 7,309 sq. ft., not 10,890 sq. ft.

Ms. Esposito reminded the Board that the reason for 'enhanced' lot coverage was to provide smaller lots with some flexibility for development that might not exist due to their smaller size. That rationale did not apply to bigger lots, as there was more land already providing the owner-developer with flexibility.

Drawing the Board's attention to page two (2) of Exhibit 10, Ms. Esposito pointed out that the agency believed that the request failed to meet all of the Critical Area Variance standards in *Code* § 190-58 of the ordinance. Specifically, the CAC believed that there was no "unwarranted hardship". Once combined the lot becomes an undeveloped conforming lot without special physical characteristics that would require an area or lot coverage variance. There is the ability to build a reasonably sized residence and amenities within the fifteen percent (15%) permitted lot coverage. She noted that the lot coverage issue in this case was caused by the size of the proposed improvements, and that development decision was totally within the control of the Applicant and its agents.

The CAC also believed that the Applicant was not being deprived of a right available to other lot owners. All lot owners have the right to improve their lots provided lot coverage does not exceed fifteen percent (15%) of the total lot area. 'Enhanced' lot coverage is not available for lots over 36,000 sq. ft. in size. *Code* § 190-15.C 6-4(b). The owner may always improve the larger property provided the improvements do not exceed the fifteen percent (15%) lot coverage

limitation imposed. Ms. Esposito argued that allowing the Applicant to vary the lot coverage requirement without statutory authorization permitting an owner to exceed the fifteen percent (15%) lot coverage limitation would confer a special benefit on the Applicant that others in the use district would not be permitted.

Reminding the Board that the statute, *Md. Code*, Nat. Resources §8-1801(a) (4) and *Code* §190-15. create a rebuttable presumption that human activity in the Critical Area is detrimental to the Chesapeake Bay, Ms. Esposito stated that unwarranted hardship must exist before a Board of Appeals should even consider varying lot coverage requirements. She did not feel that the mandatory required mitigation would overcome that presumption.

Mr. Dorsey commented that given the standards addressed on the CAC letter he wondered why the CAC had not felt the Applicant's proposal would be the minimum adjustment necessary to alleviate the hardship. Ms. Esposito responded that she felt that her response to the other standards addressed that issue.

Mr. Jones had a question concerning pools in SDB areas. He explained that there are many pools situated in these areas throughout the county, and asked why the CAC customarily had not taken issue with their construction or placement. Ms. Esposito responded that the CAC was not opposed to pools, but generally did not like them in the SDB. The approval of a pool would depend on the differing circumstances of each lot and each request proposed. In the case under consideration, the property was over an acre in size, and the CAC did not see any need to exceed the fifteen percent (15%) lot coverage requirement.

Mr. Krebeck asked about the CAC response in finding seven (7) on page four (4) of its letter. He wished to understand why the CAC felt that the SDB area would be better off by not allowing the variance in the event that the variance provided for greater mitigation. Ms. Esposito responded that the Applicant was still going to have to do the required mitigation pursuant to the Critical Area law. The CAC felt that the lesser land disturbance would be more beneficial overall.

The next witness in opposition to the request was Betty Blount, 720 Riverview Terrace, St. Michaels, MD 21663. She lives directly across from Lot 9. Ms. Blount had submitted a packet of material, marked as Exhibit 18. Her material contained letters to her regarding the covenants imposed on the two lots and responses from her attorney. She explained she knew the covenant that had been imposed on both lots requiring that there could be only one primary "structure" on the two lots. Mr. Dorsey asked the witness to clarify her objection. She was not opposed to the

residence, but believed that the pool house was a second “structure” and prohibited by the covenants.

Mr. Bob Little, 712 Riverview Terrace, St. Michaels. MD 21663 has been a resident on that street for about twenty-five (25) years. He knew Mary Harrison who had imposed the covenant. Ms. Harrison also owned other lots in the area and had been improving the neighborhood by planting street trees and by attempting to limit development for the immediate area to control density. He was concerned that the current development plan would frustrate Ms. Harrison’s plans for the area, as her plan had intended to allow one house on two lots rather than two houses on one larger lot. He felt the pool house structure amounted to another small house. He believed the plans could be reworked to be within the lot coverage requirements. He felt the variance would “open up” the possibility of others wanting to waive the lot coverage limitations.

There being no further testimony in opposition, Mr. Showalter spoke in rebuttal. He commented on some of the evidence by saying that the Board was not being asked to determine what effect the covenant might have on the development of the two lots. He felt the Applicant’s proposal was consistent with the covenant. There will be only one primary structure. The Board is being asked to grant a variance to the lot coverage requirement. If the lots were to be combined, the combined parcel would have a lot coverage threshold of fifteen percent (15%). That would amount to 7,309 sq. ft. If considered separately, and ‘enhanced’ lot coverage was allowed for each lot, the combined total lot coverage might possibly be 10,980 sq. ft. The Applicant was proposing allowing ‘enhanced’ lot coverage for one lot, 5,445 sq. ft. and not exceeding fifteen percent (15%) lot coverage for the second lot. The Applicant was proposing a primary structure with lot coverage of 3,200 sq. ft., and a pool house with 900 sq. ft, inclusive of both finished and unfinished areas. Both are shown on the proposed site plan, Exhibit 17, which is drawn to scale. The total proposed lot coverage is 8,862 sq. ft. The request has been rounded up to provide for things like HVAC platforms and steps. There is a pool proposed and it is within the SDB. Mitigation for that intrusion will require two significant canopy trees as well as shrubs. He believed the Applicant had met its burden.

Ms. Vainieri asked Ms. Esposito about the required mitigation. Ms. Esposito responded that any development that intruded into the SDB would require mitigation, and the developer would have to comply with the Critical Area law regardless.

Mr. Little commented that the proposed improvements exceeded the lot coverage threshold by 1,691 sq. ft. He did not believe there was any uniqueness that would justify waiving the lot coverage requirement.

There being no additional public comment, Mr. Jones informed the Board and public that the Applicant has the burden of proof under the Board's Rules. The Applicant has to decide what to offer as evidence and may, but is not required to submit construction plans. He asked if the members wished to discuss the evidence. The Applicant would have to meet each of the following standards:

58-4 Standards for Variances to Critical Area Provisions.

- A. Standards. In order to grant a variance to the provisions of the Critical Area Overlay District, the Planning Director or Board of Appeals must determine that the Application meets **all** of the following criteria:
 - 1. Special conditions or circumstances exist that are peculiar to the land or structure such that a literal enforcement of the provisions of this chapter would result in unwarranted hardship.
 - 2. A literal interpretation of the Critical Area requirements will deprive the property owner of rights commonly enjoyed by other property owners in the same zoning district.
 - 3. The granting of the variance will not confer upon the property owner any special privilege that would be denied by this chapter to other owners of lands or structures within the same zoning district.
 - 4. The variance request is not based on conditions or circumstances which are the result of actions by the applicant, including the commencement of development activity before an application for a variance has been filed, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming on any neighboring property.
 - 5. The granting of the variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat, and granting the variance will be in harmony with the general spirit and intent of the state Critical Area Law and Critical Area Program.
 - 6. The variance shall not exceed the minimum adjustment necessary to relieve the unwarranted hardship.
 - 7. If the need for a variance to a Critical Area provision is due partially or entirely because the lot is a legal nonconforming lot that does not meet current area, width or location standards, the variance should not be granted if the nonconformity could be reduced or eliminated by combining the lot, in whole or in part, with an adjoining lot in common ownership.
- B. In considering an application for a variance to Critical Area requirements, the Board of Appeals or Planning Director shall:

1. Presume that the specific development activity in the Critical Area for which a variance is required does not conform with the general purpose and intent of the Natural Resources Article Title 8, Subtitle 18, COMAR Title 27 and the requirements of the County's Critical Area Program. The Applicant has the burden of proof to overcome this presumption of nonconformance.

Mr. Dorsey stated he was not sure the Applicant had met standards one (1) and six (6) of the Critical Area variance criteria, *supra*. He noted that Mr. Showalter suggested that there are special circumstances that create a hardship for this lot owner, but the Staff Report, Exhibit 8, states that there are no special circumstances, as there will be one conforming lot if or when consolidated. He felt that given the contradiction, the standard might not be met. Mr. Showalter reminded the members that the hardship involved might not be one relating to topography or setback but could be some unique problem that made the strict application of the ordinance unfair. He directed the Board to fourth page of Exhibit 8, paragraph (six) 6, where staff has acknowledged that this was a unique situation.

Mr. Dorsey also felt that the Applicant failed to meet standard Six (6) requiring that the proposed variance would be the minimum adjustment necessary to relieve the hardship. He believed the Applicant could relieve the necessity for a variance by reworking the plans. Mr. Showalter replied that the proposed plans met the requirements his clients had for their reasonable use of the property. He added that the question of what is reasonable can be viewed from the perspective of whether the proposed plan would provide a reasonably functional residence for the owners. Mr. Dorsey paraphrased Mr. Showalter's argument inquiring if the Applicant was really saying that there was no other site design that would meet the Applicant's needs and be within the fifteen percent (15%) lot coverage. Mr. Showalter confirmed that was the Applicant's position.

Mr. Krebeck had some concerns. He believed that there were opportunities to minimize. He thought the only special condition here was that there were two lots, and was unsure if that fact alone created a special condition or unwarranted hardship. He believed that the Applicant planned to use the property as one contiguous parcel as suggested by the CAC. He felt it was too early in the design process to know what the effects on water quality and habitat would be.

Mr. Shortall agreed with both of his fellow Board members. He stated he would find it hard to justify a variance where the owners could make changes to their proposed plans that would alleviate the need for the variance.

Mr. Cavanaugh stated that the issue before the Board was whether the Applicant could justify a variance to the lot coverage limitation of fifteen percent. (15%). To do so it would have

to meet all the standards of Code § 190-58. He did not believe the Applicants had satisfied standards one, (1) he did not find special conditions or unwarranted hardship; two, (2) the property owner did have the rights commonly enjoyed by others within the zoning district; three, (3) the grant of the variance would create a special privilege for the Applicant; six (6) the variance would exceed the minimum necessary to relieve the hardship, where plans could be restructured to comply with the lot coverage standards and seven (7). There might be some issues affecting water quality or habitat. In short, Mr. Cavanaugh did not believe the evidence met the required standards.

Mr. Jones stated he understood what the Applicant wished to do. While he liked Mr. Erickson's designs, and the proposed layout, the Board is not an architectural review committee. The Board is dealing with an acre undeveloped lot, and unless there is something very unusual about the lot that creates "unwarranted hardship", the lot coverage limitation is sacrosanct. He first thought the hardship might lie with the fact there were two lots, but asked himself if there anything unusual about combining them. Although the benefit of lot consolidation is not proportional, there is still a benefit. If one is talking only about the resulting one acre lot, the owners have a substantial amount of square footage to work with, the same as any other lot owner with a waterfront lot one acre in size. Allowing this variance will not serve the public as there are other lot owners who will want special treatment, and then the law becomes meaningless. He added that he wanted to repeat what his fellow Board members said and he agreed with the analysis of the CAC staff.

Having considered the Code, the Application and the testimony presented, the Board makes the following findings of fact and conclusions of law:

1. The Applicant has submitted a written application for a Critical Area variance allow 9,000 sq. ft. of lot coverage on a proposed one acre lot in the Critical Area. Exhibit 1.
2. The public hearing was properly advertised, the property was posted, and the adjacent land owners were properly notified. Exhibits 2, 3, 4, 5, 6 and 9.
3. The property in question is two adjoining lots, lot 9 and 10 Section A of Bentley-Hay subdivision. The subdivision plat was recorded in 1947, antedating both zoning in Talbot County and the Critical Area Law and Talbot County Critical Area program. Lot 10, the larger lot, contains

25,027 sq. ft. and lot 9, the smaller contains 23,700sq. ft. Permitted lot coverages are respectively 3,754 and 3,555 sq. ft.

4. If granted a variance, the Applicant plans to consolidate the lots creating a one acre parcel containing 48,727 sq. ft.
5. The consolidated parcel is entitled to fifteen percent (15%) lot coverage as of right pursuant to *Code* § 190-15-6 C (1).
6. ‘Enhanced’ lot coverage provided as an exception to the required lot coverage limitation allowing a lot owner to exceed the fifteen percent (15%) lot coverage limitation is not available for lots exceeding 36,000 sq. ft. *Code* §190-15-6 C (4) (a) Table III-3.
7. The Applicant has not produced evidence of “unwarranted hardship” required by Code §190-58 (1). Although the lot coverage limitation will not allow the Applicant to build as desired, it is possible to re-work the plans to stay within the threshold and have reasonable use of the consolidated lot or both of the single lots.⁴ The size of the residence is modest, but some of the other impervious areas could be minimized to stay within the threshold.
8. The need for the variance is self-created. The Applicant purchased the property as originally platted. The lots were created in 1947 at a time when zoning did not yet exist in Talbot County. Talbot County adopted its Critical Area Program in 1989. Since the adoption of the recently updated zoning ordinance, the owner of two adjoining lots may not disregard an interior lot line, but must consolidate the adjoining lots in order to build across an interior lot line. That obligation applies to all lots. The cause of the request for variance is the Applicant’s wish to construct improvements that, as currently proposed, exceed the lot coverage limitation on the consolidated lot. When queried, Applicant’s agent stated that they ‘were not able’ to scale back the proposed

⁴ The Board has not considered the effect, *vel non*, of the covenant recorded in the deed recorded in Liber 525 folio 691, a Land Record for Talbot County.

improvements to meet the threshold requirement and still obtain 'reasonable use' of the combined lots.

9. The reason for the variance is the Applicant's desire to create improvements containing square footage in excess of the fifteen percent (15%) threshold limitation. The Applicant does not wish to modify its plans.
10. There is no exception to the lot coverage requirements that would permit the Applicant to achieve its desired objective without granting the Applicant a special privilege not allowed to the owners of other conforming unimproved one acre waterfront lots.
11. The Applicant has the same rights as the lot owners of other conforming one acre waterfront lots to improve its property consistent with the provisions of the *Code*.

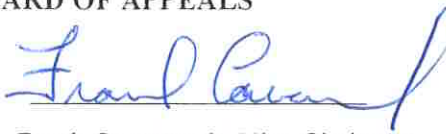
For the reasons set out in the Board's findings, Mr. Cavanaugh made a motion that the requested variance be denied. Mr. Dorsey seconded the motion. There being no further discussion, the Chairman called for a vote. The motion passed with a vote of five in favor, zero opposed


HAVING MADE THE FOREGOING FINDINGS OF FACT AND LAW, IT IS, BY THE TALBOT COUNTY BOARD OF APPEALS, ORDERED THAT THE VARIANCE BE DENIED.


GIVEN OVER OUR HANDS, this 30th day of December, 2020.

TALBOT COUNTY BOARD OF APPEALS


Phillip Jones, Chairman


Frank Cavanaugh, Vice Chairman


Louis Dorsey, Jr., Member


Paul Shortall, Member


Zakary Krebeck, Member